Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1985 Term

No. 85-1501

IN THE MATTER OF THE APPLICATION

OF

CORTLANDT NURSING HOME, HIGHLAND NURSING HOME INC., and KING STREET HOME, INC.,

Petitioners,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; C. MARK LAWTON, as Director of the Budget of the State of New York; and DONALD KITCHEN, as Commissioner of Social Services of St. Lawrence County,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Brief for State Respondents in Opposition

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Dated: April 14, 1986

Question Presented.

Has a constitutional question been drawn into issue with respect to the decision of the New York Court of Appeals that (1) in the case of *Cortlandt Nursing Home*, there has not been unreasonable administrative delay within the meaning of section 301(1) of the State Administrative Procedure Act and that (2) in the cases of *Highland Nursing Home* and *King Street Home*, it could not consider whether there has been unreasonable delay because the administrative hearings have not been concluded and, therefore, directed that such hearings be held.

Table of Contents.

	Page
Question Presented	i
Statement of the Case	2
1. The Facts	2
2. The Proceedings	2
Reasons For Denying The Writ	5
1. No constitutional question has been drawn into issue	5
2. Administrative delay standing alone does not under the circumstances presented here violate petitioners' right to due process of law	8
3. There is no final State court judgment in Highland and King Street	9
Conclusion	10
Appendix	A1

TABLE OF AUTHORITIES.

Page

CASES:

Barbara v. Dembroski, 54 NY2d 648 (1981)..... 7

Barbara C., Matter of, 64 NY2d 866 (1985)..... 7

Cibro Petroleum Products, Inc. v. Chu, ____ NY2d ____ (decided March 20, 1986)..... 7

Eagle, Matter of v. Patterson, 57 NY2d 831 (1982).. 7

Flemming v. Nestor, 363 US 603 (1960)..... 8

Fusari v. Steinberg, 419 US 379 (1975)..... 8

Heckler v. Day, ____ US ____, 104 S Ct 2249 (1984). 8

INS v. Miranda, 459 US 14 (1982)..... 8

Minnick v. California Dept. of Corrections, 452 US 105 (1981)..... 10

Solnick v. Whalen, 49 NY2d 224 (1980)..... 4

Webb v. Webb, 451 US 493 (1981)..... 7

Wright v. Califano, 587 F2d 345 (7th Cir 1978)..... 8

FEDERAL STATUTE:

28 USC § 1257..... 10

Page

NEW YORK STATE STATUTES:

CPLR § 213 6

State Administrative Procedure Act § 301(1) 4

NEW YORK STATE REGULATIONS:

10 NYCRR 86-2.7 2

10 NYCRR 86-2.7(b) 2

10 NYCRR 86-2.7(e) 2

10 NYCRR 86.8 2

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Brief for State Respondents in Opposition.

Statement of the Case.

The State respondents supplement petitioners' statement of the case in the following respects.

1. *The Facts*

As the Court of Appeals described (Pet App 14),[1] under the State's Medicaid rate making methodology, petitioners' fiscal and statistical reports, upon which their prospective Medicaid rates were calculated, were subject to audit for a period of six years after filing. State Health Department regulation 10 NYCRR 86-2.7 formerly 86.8. At the completion of the audit, petitioners were afforded a closing conference, at which time they could produce additional documentation in support of their positions. 10 NYCRR 86-2.7(e). Thereafter, they could initiate a bureau review of the audit to challenge specific items of the audit, and within 30 days of receipt of the bureau review determination, they could request an administrative hearing (Pet App 6). 10 NYCRR 86-2.7(b) and (e). Pursuant to the regulations, "* * * petitioners are charged with the knowledge that any rate of payment will be construed to represent a provisional rate until an audit is performed and completed * * *" (Pet App 13). The facts with respect to each petitioner are set forth in the decision of the New York Court of Appeals (Pet App 7-10).

2. *The Proceedings*

The petitioners commenced separate proceedings pursuant to article 78 of the New York Civil Practice Law and Rules seeking judgments enjoining the respondents from

[1]Refers to the appendix attached to the petition.

recovering or attempting to recover Medicaid overpayments determined after audits (Pet App 44, 66, 86). In the case of *Cortlandt Nursing Home* (hereafter "*Cortlandt*"), an administrative hearing had been concluded and the State Commissioner of Health had issued a final order upholding audit disallowances (Pet App 47, 56). In the cases of *Highland Nursing Home* and *King Street Home* (hereinafter "*Highland*" and "*King Street*"), administrative hearings had not been concluded (Pet App 69, 89).

In each case, the petitioners alleged in their separate petitions that recoupment is barred by the six-year statute of limitations set forth in section 213 of the New York Civil Practice Law and Rules (Pet App 47, 69, 90). Additionally, the petitioners in *Cortlandt* and *King Street* alleged that recoupment was barred by the laches of the State respondents (Pet App 47, 90).[2] The petitioners did not allege that they have been prejudiced by or that their due process rights have been violated by administrative delay caused by the respondents. These cases have been decided upon State law issues.

The Appellate Division of the State Supreme Court rejected the lower court's holding that the administrative

[2]*Highland* also alleged, but did not subsequently argue in the State courts, that respondents have recouped and continue to recoup money without affording it "* * * its due process right to a hearing" (Pet App 70). The Court of Appeals noted with respect to such hearing,

> "[a]lthough no hearing has been held, it has been noted by respondents (Verified Answer, para 13), and has not been rebutted by petitioners, that any failure to conduct a hearing in accordance with the order of the Appellate Division has been upon the mutual consent of the involved parties" (Pet App 8-9).

proceedings here were barred by the State statute of limitations. However, it held that respondents were properly enjoined from recoupment or attempted recoupment by section 301(1) of the State Administrative Procedure Act, which requires that parties to an adjudicatory proceeding "* * * shall be afforded an opportunity for hearing within reasonable time". Based upon its view of State public policy as set forth in *Solnick v. Whalen,* 49 NY2d 224, 232 (1980), the Appellate Division concluded that it is not reasonable "* * * to permit a 10-year delay in reaching a determination by an administrative agency which provides finality to a reimbursement rate" (Pet App 38, 39).

The Court of Appeals, in its decision reversing and modifying the Appellate Division's orders in these cases, also noted that the critical issue here is whether "* * * delay in adjudicating the final rate of Medicaid reimbursement violated the directive of the State Administrative Procedure Act that hearings be conducted within a reasonable time" (Pet App 5). It rejected the petitioners' contentions that the passage of time, standing alone, provided a basis in the circumstances presented here for enjoining recoupment or attempted recoupment. It stated that an administrative agency in the first instance and the judiciary sitting in review must apply a balancing test, considering several factors,[3] to determine whether a period of delay is reasonable within the meaning of the State Administrative Procedure Act (Pet App 13).

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[3]They include, "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (Pet App 13).

However, the Court of Appeals held that it could not consider the reasonableness of administrative delay in *Highland* and *King Street* because the administrative hearings have not been concluded (Pet App 17). It observed that, "* * * absent extraordinary circumstances, a court may not intervene in an administrative proceeding, for reason of adjudicatory delay, until a hearing has been held and an official order rendered" (Pet App 16). Thus, the Court of Appeals was limited, under State procedure, to granting mandamus to compel a hearing in those cases (Pet App 17). It noted that it was within the province of the administrative agency, in the first instance, to determine whether there has been substantial prejudice to a facility resulting from administrative delay (Pet App 16).

The Court of Appeals considered the issue of administrative delay in *Cortlandt* because in that case the administrative hearing had been concluded. Based upon the record, it could not say that there had been unreasonable delay within the meaning of the State Administrative Procedure Act (Pet App 19). It noted that petitioner neither demonstrated the manner by which administrative delay had handicapped its defense efforts at the administrative hearing nor contended that administrative delay had precluded expansion of services or caused curtailment of existing services (Pet App 18). The Court of Appeals did not discuss or decide any constitutional issues.

REASONS FOR DENYING THE WRIT

1. No constitutional question has been drawn into issue.

It is clear from reading the petitions and decisions in these cases that they have been argued and decided on the basis of State law. Initially, the State Supreme Court held

that the respondents were barred from recouping or attempting to recoup Medicaid overpayments pursuant to the six-year statute of limitations set forth in section 213 of the State Civil Practice Law and Rules (Pet App 43, 64, 85).

Although the Appellate Division of the State Supreme Court rejected this reasoning, it nevertheless affirmed the injunctions granted by the State Supreme Court relying on the provision of section 301(1) of the State Administrative Procedure Act, which requires that an adjudicatory hearing must be held "within reasonable time" (Pet App 38). It did not discuss any constitutional issues, and the petitioners did not raise any. They had argued that the respondents were barred by the six-year statute of limitations and that, in any event, the State should not be "* * * permitted to accomplish administratively what it would be barred from doing in the civil context of the judicial process" (Pet App 37, 38).

The petitioners' contention (Pet 9, n 3) that a due process issue was raised and preserved below is simply not supported. Their reference to the Appellate Division decision (Pet App 37) as evidence that a due process claim had been made is plainly wrong. The Appellate Division noted only that respondents had stated, in discussing when a cause of action would accrue under the statute of limitations, that "* * * a Medicaid provider must be afforded due process through an administrative hearing when the Commissioner seeks to recoup purported overpayments" (Pet App 37). This hardly constituted the discussion of the merits of the constitutional issue sought to be argued here by the petitioners that mere delay denies them due process.

Nor did the petitioners raise any constitutional issues in the New York Court of Appeals. The "summary" in petitioners' brief made two fleeting references to "due process" without reference to the federal Constitution or cases relying on the federal Constitution.[4] The Court of Appeals did not address or allude to this so-called issue. Moreover, even if the petitioners had made extensive due process arguments based upon the federal Constitution, the Court of Appeals would not have considered them. That Court has stated that it will not consider constitutional theories that were not argued in the Appellate Division, even if they were alleged in the complaint. *Matter of Barbara C.*, 64 NY2d 866 (1985); *Matter of Eagle v. Patterson*, 57 NY2d 831 (1982); *Barbara v. Dembroski*, 54 NY2d 648 (1981); *Cibro Petroleum Products, Inc. v. Chu*, ____ NY2d ____ (decided March 20, 1986). Since petitioners did not raise any constitutional arguments in the Appellate Divison, they were precluded from raising them in the Court of Appeals.

It is well settled that this Court has jurisdiction to review the final judgment of a State court "* * * only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 US 493, 496-497 (1981). Where the State's highest court has failed to pass upon a federal question, it is assumed, unless the petitioners show the contrary, that the omission was due to want of proper presentation of such issue in the State court. *Id.* at 495. Here, petitioners point to nothing in the record which shows that the State courts were afforded an opportunity to pass upon the question of federal constitutional law which they now belatedly raise. *Id.* at 499. Ac-

[4]Pages 32 and 33 of petitioners' brief in the New York Court of Appeals are annexed hereto.

cordingly, we respectfully submit that this Court does not have jurisdiction to consider the federal issue.

2. Administrative delay standing alone does not under the circumstances presented here violate petitioners' right to due process of law.

In any event, there is no merit to petitioners' contention that their right to due process of law has been violated by the mere passage of time between the dates they were paid under the Medicaid program and audit proceedings were either finally concluded or hearings noticed. The petitioners had not alleged that they were prejudiced by delay or who had caused delay. As the New York Court of Appeals observed, Cortlandt, whose hearing had been finally concluded, had not demonstrated how administrative delay had handicapped its defense at the administrative hearing or precluded expansion of services or caused curtailment of existing services (Pet App 18).

This Court has had occasion to hold that it would be unwarranted for courts to intervene in administrative proceedings based upon administrative delay alone. *INS v. Miranda*, 459 US 14, 18 (1982); *Heckler v. Day*, ____ US ____, 104 S Ct 2249, 2258 (1984). In *Wright v. Califano*, 587 F2d 345 (7th Cir 1978), that court specifically considered whether administrative delay standing alone violated due process. Citing this Court's decisions in *Fusari v. Steinberg*, 419 US 379, 389 (1975), and *Flemming v. Nestor*, 363 US 603 (1960), it concluded that there was no due process violation because the "* * * record does not establish that the delays are arbitrary or the result of some other inexcusable circumstance." 587 F2d at 354.

Petitioners' challenge in this case based upon the passage of time alone amounts to an attack on the methodology by which their Medicaid rates were determined and paid. Under that methodology, audits could be initiated by respondents for up to six years after the fiscal and statistical reports of the provider had been filed. However, they did not challenge, at the time they accepted payment, the right of respondents to audit them subsequently, and, we respectfully urge, that they cannot now do so under the guise of a due process challenge.

Petitioners have pointed to no case law which supports the proposition that they have been denied due process of law by the mere passage of time in concluding audit proceedings. Nor do they offer any reason why the procedural safeguards described by the New York Court of Appeals are insufficient to protect them against substantial prejudice resulting from administrative delay. Accordingly, we do not believe that this case presents a question which warrants consideration by this Court.

3. There is no final State court judgment in *Highland* and *King Street*.

The New York Court of Appeals has treated *Highland* and *King Street* as proceedings in the nature of mandamus and directed that respondents hold hearings in accordance with its decision (Pet App 21). In those hearings, it will be within the province of the administrative agency, in the first instance, to determine the cause of delay and whether substantial prejudice has resulted to the facility from administrative delay (Pet App 16). If administrative delay has significantly and irreparably handicapped either facility in mounting a defense, the administrative agency, or a court reviewing a final administrative order, is authorized to dismiss the proceeding (Pet App 17).

Clearly, the judgments directing that respondents hold hearings in *Highland* and *King Street* are not final judgments within the meaning of 28 USC § 1257. Any issues raised by the petitioners with respect to administrative delay may be mooted by such proceedings or at least the records sufficiently developed so that such issues may properly be considered by a reviewing court. *Minnick v. California Dept. of Corrections*, 452 US 105, 123 (1981).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
April 14, 1986

Respectfully submitted,

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APPENDIX.

(32) and prejudicial. They make a mockery of administrative "due process" and the "reasonable time" constraints placed on administrative hearings by §301 of SAPA. Moreover, these delays are not just isolated instances, but the latest in a line of cases by one particular administrative agency, as reflected by the numerous lower court opinions cited.

It is time for the highest court of this State to send a message to that agency that such gross bureaucratic inefficiency will no longer be tolerated, and that officials of government, although possessed of great administrative powers and subject to only limited judicial review, are not completely free to abuse those powers, especially in the context of "quasi-adjudicatory" proceedings.

The lower courts are obviously painfully aware of the magnitude of the problem, but they clearly need the imprimatur of the Court of Appeals to help them curb such abuse. Petitioners here are not asking this Court to divest administrative agencies of jurisdiction every time a delay occurs, but surely there comes a point in time when unexcused protracted delay becomes so extreme that administrative agencies' assertions of continuing jurisdiction become ridiculous.

It will surely offend the public's perception of justice if the state can cry "delay" and thereby foreclose a party's review of its actions unless initiated within four months (*Solnick v. Whalen*, 49 NY2d 224), and then turn around (33) over a decade later and assert claims of the very same nature arising out of the same time period.

Nevertheless, the inexorable logic of Appellants' arguments is that as long as a particular case falls within

an agency's general area of jurisdiction, even if the case were one hundred years old, an agency could still hold a hearing, and the courts would be powerless to intervene until after the matter were to come before them in a "certiorari" type proceeding. Appellants take advantage of dictum in one of this Court's recent decisions involving a delay of seven and one-half months (*Matter of Geary v. Commissioner of Motor Vehicles*, 59 NY2d 950 [1983]), as support for this general proposition. The absurdity of such an argument is exceeded only by the complete disdain it shows for "administrative due process," not to mention the waste of resources—both public and private.

This Court should exercise its powers to enforce the mandate of §301(1) of SAPA, clarifying and limiting the scope of *Geary, supra.* There must come a point in time when bureaucratic "delay" becomes so clearly "inordinate" (as in the present cases), that "due process" as well as SAPA requires divesting an administrative agency of further jurisdiction in adjudicatory type proceedings.